

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



ORIGINAL

74-2522 <sup>B</sup><sub>pl</sub>S

IN THE  
**United States Court of Appeals**  
**For the Second Circuit**

No. 591—September Term—1974

UNITED STATES OF AMERICA,

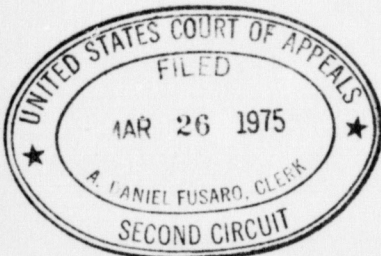
*Appellant,*

v.

IRVING STERN,

*Appellee.*

**PETITION FOR REHEARING**



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IN THE  
**United States Court of Appeals**  
**For the Second Circuit**  
**No. 591—September Term—1974**  
Docket No. 74-2522

—0—

UNITED STATES OF AMERICA,

*Appellant,*

v.

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*Appellee.*

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**PETITION FOR REHEARING**

*To the Honorable Judges of the United States  
Court of Appeals for the Second Circuit:*

IRVING STERN, the defendant-appellee above named, presents this, his petition for a re-hearing in the above entitled cause and, in support thereof, respectfully shows:

**I.**

This Honorable Court, in its opinion of reversal herein, it is respectfully asserted, has clearly misapprehended, and failed to give due consideration to, the fact findings of the District Court which, after a two day hearing encompassing testimony as to the events preceding the tape recording, as well as reading the subsequent tape transcript and

listening to the tape, found certain portions of the material sought to be suppressed as being within the attorney-client privilege and therefore, suppressable.

This Honorable Court's opinion stated that "A review of the record of the suppression hearing persuades us that there was no basis for concluding that an attorney-client relationship existed between Bodenstein and Stern at the time of the conversations in question." But, it is respectfully urged, the record clearly indicates that the District Court, and trier of the facts, elicited the acknowledgment from Bodenstein himself that at least part of Bodenstein's ostensible purpose in discussions with Stern was to help find a solution to Stern's problems that had been talked about on earlier occasions and that it was from a *legal standpoint*. Part of this was for Bodenstein to help in arranging for an appointment with specialist counsel. See, Appellee's brief, at p. 6.

Furthermore, this Honorable Court has overlooked the fact that the District Court, the determiner of credibility, had accepted Stern's version of events with respect to many of his contentions, as was inherent in its finding that there was an attorney-client relationship. Stern had testified, before the District Court, that *prior* to May 18, 1973 (the date of the tape recording) Bodenstein had repetitively assured Stern that since Stern came to him as an attorney for legal advice his confidences *were* protected. Stern offered to pay Bodenstein a legal fee but was only told that it wasn't necessary, *not* that there was no privileged conversation and that he could not consult with him. Stern testified that he felt Bodenstein was knowledgeable with respect to tax difficulties and especially since Bodenstein had experienced such problems personally. See, Appellee's brief, at pp. 7-8. On the occasion immediately prior to the tape recorded conversation of May 18, 1973, Stern had come

to Bodenstein to seek legal advice on what Stern conceived to be a serious tax problem involving his past finances. Bodenstein obtained particulars and advised Appellee with respect to securing further particulars. The need for additional and specialist counsel was discussed. Bodenstein assured Stern that their conversation was confidential. See, Appellee's brief, at pp. 8-9.

It is respectfully submitted that the record is replete with a factual basis for the District Court's sustaining the appellee's claim that an attorney-client relationship existed and the District Court, the trier of the facts, so found. In this regard, it is respectfully submitted that this Honorable Court overlooked and misapprehended the general principles asserted in *Glasser v. United States*, 315 U.S. 60, 80 (1943) and *Campbell v. United States*, 373 U.S. 487, 83 S. Ct. 1356, 1360 (1963), with respect to viewing evidence upon appeal. The government did not contend, nor does this Honorable Court's opinion assert, that the District Court's fact finding in Stern's favor, with respect to attorney-client privilege as to Stern's financial disclosures to attorney Bodenstein, was clearly erroneous. See, *e.g.* *Campbell v. United States*, *id*; *United States v. Lockett*, 484 F.2d 89, 90 n.1 (9th Cir. 1973) (per curiam). As was orally argued before the panel, the District Court actually heard the testimony of Irving Stern and attorney Bodenstein and came to its conclusion based on that, which included the facts *preceding* as well as the tape recording itself. Surely the questions resolved by the District Court were "... ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous." *Campbell v. United States*, 83 S.Ct. 1356, 1360.

It is respectfully contended, although the statement was made in the decision of this Honorable Court that "Nor at argument was counsel able to state what legal advice

Stern was seeking," that it was stated that the legal advice sought was a legal answer to the financial facts as elicited by Bodenstein from Stern, both *prior* to the tape recording and during it as well, and which Stern, believing his conversations to be privileged, as Stern so testified, furnished to an attorney in the hopes that this would result in some sort of legal assistance.

It is respectfully urged that this Honorable Court overlooked the District Court's specific opinion, not refuted by any evidence or case law in the record, that a person can seek legal advice from a lawyer, without any clear idea of what the lawyer can do for him and success is not the criteria on the issue of privilege. See, Appellee's brief, at p. 12. Any other criteria would require people consulting with lawyers, confident in *their* minds that their revelations were being kept confidential, to consult at their own peril in the event that the attorney had other motivations or conceptions in *his* mind. But, as stated in *Hunt v. Blackman*, 128 U.S. 464, 470 (1888), the privilege is that of the client alone. Thus the motivations of the attorney or his objects are of no consequence. Nor is there any form of language required to establish the relationship. *Alexander v. United States*, 138 U.S. 353 (1891). Thus, the content of the conversation, however abhorrent it might be to society, or however sordidly phrased, has no bearing as to the privilege. The privilege, in essence, protects the subjective beliefs of the person communicating information to an attorney, believing it to be privileged, and even if foolishly hoping for some legal solution to his problem. As the District Court noted, based on its hearing of all of the evidence, the confidences that Stern gave to attorney Bodenstein would not have been given to him without the belief on the part of Mr. Stern that he was giving them to someone who would have the judgments that are associated with attorneys. See, Appellee's brief, at p. 13.

It is further respectfully urged that this Honorable Court misapprehended the validity of the District Court's finding, as noted immediately above, when it commented, with respect to it, that the financial information was elicited from Stern "... in direct response to questions by Bodenstein, a potential *co-defendant*, whether he (Bodenstein), his father-in-law, or his business were likely to be implicated in any bribe payments to Stern." [Emphasis supplied], following this observation up with the further observation that "Similarly, Stern's requests for help in choosing expert tax counsel were pleas of a frightened man looking for a solution to his problems *from someone who might be implicated as a co-defendant* if Stern failed to find an explanation for the bonds." [Emphasis supplied] It is respectfully submitted that in this analysis, this Court has erred for, at no time, was there any *evidence* forthcoming which could factually classify Bodenstein as a co-defendant with Irving Stern and particularly with respect to the bonds. It is agreed by all that no payments were ever made to Stern with respect to IBP. And, the indictments returned against Stern do not refer to Bodenstein as a co-defendant or even an unindicted co-defendant. Thus, it is respectfully urged, too great a stress has been placed upon a factual aspect not factual at all. And, therefore, the acknowledgment by this Honorable Court "That Bodenstein was an attorney may well have been an additional factor which caused Stern to ask Bodenstein for advice." when coupled with "However it was Bodenstein's status as a *potential co-defendant* under investigation, not as an attorney, which was of paramount importance in their relationship", [Emphasis supplied] is a case where emphasis has, unfortunately and erroneously been misplaced. It is respectfully submitted that instead of giving due emphasis to the facts found by the District Court, *i.e.* that Bodenstein was an attorney and *this factor*

caused Stern to ask Bodenstein for advice, undue emphasis has been given to an erroneous conception of fact, *i.e.* that Bodenstein was a "potential co-defendant" under investigation and this was of paramount importance, which is not borne out by evidence in the record. Absent *clear error* in fact finding with respect to the attorney-client privilege, a contention neither made by the government nor found by this Honorable Court, the District Court's facts and resulting opinion in this regard should have been affirmed.

In sum, it is a misassumption of fact which has caused this Honorable Court to give undue emphasis to an aspect which not only has never materialized but never was. Bodenstein, as the record indicates clearly, was a person under investigation with respect to corporate tax cheating as a corporate officer, not personal tax cheating and thus has never been linked up to Irving Stern in any way. Bodenstein was never a "potential co-defendant" of Stern.

This Honorable Court further relied upon the undisputed fact that Bodenstein had refused to represent Stern on other occasions. But, it is respectfully urged, this is a misconception of its significance, for there is nothing in the record which denies the fact that Bodenstein had permitted Stern to, repetitively, *consult* with him. See, Appellee's brief, at p. 16. In fact, it was acknowledged by Bodenstein, and is also undisputed, that the method by which Bodenstein elicited financial details from Stern was the same method that he employed, as an attorney, in eliciting information from persons who were acknowledged clients. See, Appellee's brief, at p. 5.

## II.

The case of *United States v. Kovel*, 296 F.2d 918, (2nd Cir. 1961) did not, as this Honorable Court has assumed in its opinion herein, have the effect of precluding Irving Stern's contention of attorney-client privilege. It is respectfully submitted that this Honorable Court in its opinion acknowledged that Stern came to Bodenstein for advice, i.e., "That Bodenstein was an attorney may well have been an additional factor which caused Stern to ask Bodenstein for advice." Therefore, it is respectfully urged that this was, indeed, legal advice of "any kind" and the District Court so found. And it is further respectfully asserted that it is equally undisputed that the advice was sought from a professional legal advisor and that the conversation shows, and the District Court found, it was given in his capacity as such. It is respectfully urged that this is borne out by repeated references, as seen even in the tape transcript itself, to Bodenstein's capacity as an attorney and Stern's statement that Bodenstein was the only one that he had *really* consulted with. See, Appellee's brief, at p. 15.

Interwoven in this Honorable Court's consideration of fact and law, it is respectfully submitted, is an erroneous application of the principles of *Glasser v. United States*, *supra*, for this Honorable Court has viewed the evidence on appeal from a view most favorable to the government despite the fact that the government was not the appellee, thereby disregarding the weight of the evidence as determined by the District Court, the trier of the facts, and then misapplied the law propounded in *Campbell v. United States*, *supra*, *Hunt v. Blackman*, *supra*, and *Alexander v. United States*, *supra*, by denying the privilege to a layman who came to a lawyer, who he knew to be a lawyer, and to whom he confided confidential matters that had occurred

previously and about which he was grievously concerned, all of which were found to be the facts by the District Court.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

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Service of <sup>Two (2)</sup>~~three (3)~~ copies of the within  
is hereby admitted

this            day of

.....  
Attorney(s) for

COPY RECEIVED
MAR 26 1975
PAUL J. CURRAN
U. S. ATTORNEY
SO. DIST. OF N. Y.

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